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**IN RE: PHARMACEUTICAL INDUSTRY AVERAGE
WHOLESALE PRICE LITIGATION
MDL No. 1456**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF
MASSACHUSETTS

C.A. No. 01-12257-PBS

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Judge Patti B. Saris

**MEMORANDUM OF THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT
OF ITS MOTION FOR INCLUSION IN THE FEBRUARY 1, 2007 HEARING
REGARDING OTHER STATES' MOTIONS TO REMAND**

On February 1, 2007, this Court will conduct a hearing on the remand motions filed by the States of Florida, Illinois, and Mississippi.¹ The Commonwealth of Pennsylvania (hereinafter "Pennsylvania"), whose AWP lawsuit will be transferred imminently to this Court by the Judicial Panel on Multidistrict Litigation ("JPML"), respectfully requests that it be included in the February 1, 2007 hearing and that the Court consider its fully-briefed and pending Motion for Remand, which was filed in the U.S. District Court for the Eastern District of Pennsylvania prior to the transfer of this case to this Court. Counsel for Dey, Inc. does not oppose this request.

As with the other cases, Dey's removal of this case to federal court on October 11, 2006 represents the second attempt to remove this case by Defendants, and Pennsylvania contends it

¹The Commonwealth of Kentucky also has moved for inclusion in the February 1, 2007 hearing.

largely duplicates the arguments that were rejected previously by the Honorable Juan R. Sanchez, who remanded the case to the Commonwealth Court by order of September 9, 2005. *See Commonwealth of Pennsylvania v. TAP Pharmaceutical Products*, 415 F.Supp. 2d 516, 526 (E.D.Pa. Sept. 9, 2005).² That reported decision, we believe, makes clear that Dey's effort to get a "second bite" at the removal apple is wholly unmeritorious.³ *See* Opinion and Order of the United States District Court for the Western District of Wisconsin dated January 16, 2007, at p19 (describing Dey's third attempt to remove the case as "relying on a theory of questionable merit", and noting that "Dey's argument in defense of its timeliness [of removal] has been rejected by every court to consider it...").

Because Dey's removal sought to get a "second bite" at the removal apple, the Commonwealth filed and fully briefed a Motion for Remand, as well as a Motion for Expedited Treatment of that Remand Motion, on December 20, 2006. The Motion for Expedited Treatment has never been ruled upon, despite counsel's letter request last week for the Court to resolve the

In the absence of any decision by the Pennsylvania Eastern District Court, and with the JPMDL ruling on final transfer scheduled for January 25, 2007, and in light of Dey's stated position that this Court should resolve Pennsylvania's Motion for Remand, along with those of the other States, the Commonwealth filed a Notice of Withdrawal of opposition to the Conditional Transfer Order on January 23, 2007, and, thus has consented to have this Court decide the issue of remand. *See* Notice of Withdrawal, attached as Exhibit "A". The Commonwealth therefore expects a final transfer order from the JPMDL imminently.

In view of these facts, the Commonwealth of Pennsylvania hereby respectfully requests

²We respectfully submit that the prior decision of the Pennsylvania Eastern District Court, which is the law of Pennsylvania's case, should be followed.

³To date, remand has been granted to the States of Hawaii, Alabama, Wisconsin and Alaska.

that it be included in the remand hearings scheduled for February 1, 2007. The legal issues presented in the Commonwealth's remand motion are similar to those raised by Florida, Illinois, Mississippi, and Kentucky, which are also before the Court, namely: (1) whether the removals were timely pursuant to 28 U.S.C. §1446 (b); and, if so, (2) whether the federal district courts have original jurisdiction over the Commonwealth's action as required by 28 U.S.C. §1441(a). This Court is familiar with the first issue, as it construed the "order or other paper" language of §1446(b) in rejecting as untimely the previous removal of the States' AWP cases. *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 431 F.Supp.2d 98, 109 (D.Mass. 2006).

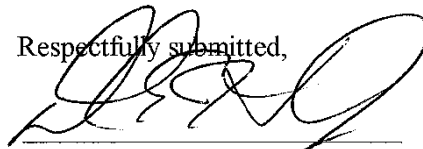
In the interest of judicial economy, the Commonwealth of Pennsylvania respectfully requests that it be included in the remand hearings presently scheduled for February 1, 2007.

Dated: 1/24/07

**COMMONWEALTH OF PENNSYLVANIA
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Respectfully submitted,



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EXHIBIT “A”

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE LITIGATION

MDL DOCKET NO.: 1456

COMMONWEALTH OF PENNSYLVANIA'S
NOTICE OF WITHDRAWAL OF OPPOSITION TO
CONDITIONAL TRANSFER ORDER NO. 33

The Commonwealth of Pennsylvania hereby withdraws its previously filed Notice of Opposition to Conditional Transfer Order (CTO-33) issued by the Judicial Panel on Multidistrict Litigation on November 8, 2006 as it pertains to the Commonwealth of Pennsylvania v. Tap Pharmaceutical Products, Inc., et al., Commonwealth Court of Pennsylvania No. 212 MD 2004.

Dated: January 23, 2007

Respectfully submitted,



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